Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Time Warner Communications Holdings, Inc. (TW Comm), by its attorneys, hereby submits its comments on the Commission's notice of proposed rulemaking issued in this proceeding,[1] and states as follows:

INTRODUCTION

As explained by the Commission in the Notice, the primary purpose of this proceeding is to assist the Commission in implementing Section 204(a)(3) of the Communications Act[2] which has been added to the Act by Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 ("1996 Act"). Section 204(a)(3) states as follows:

> A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction of rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period as appropriate.[3]

As drafted, this provision is not a model of clarity, nor does the meager legislative

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[1] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996 (*Notice of Proposed Rulemaking*), FCC 96-367, released September 6, 1996 ("Notice").

[2] 47 U.S.C. § 204(a)(3).

[3] 1996 Act, § 402(b)(1)(A)(iii).

history surrounding its enactment furnish much guidance for interpreting Section 204(a)(3). TW Comm believes that the Commission should construe that section in a manner which promotes attainment of, and which is consistent with, the purposes underlying the 1996 Act as well as the Commission's public interest responsibilities under the Communications Act.

I. Section 204(a)(3) is Applicable only to Incumbent Local Exchange Carriers. Other LECs Already are Subject to the Commission's Policies and Procedures Established for Non-Dominant Carriers.

As a preliminary matter, TW Comm directs the Commission's attention to an ambiguity in the language of Section 204(a)(3). By its terms, that provision is applicable to "local exchange carriers." As defined in the Act, a local exchange carrier (LEC) is "any person that is engaged in the provision of telephone exchange service or exchange access . . . ."[4] The reference to local exchange carrier in Section 204(a)(3) does not distinguish between incumbent local exchange carriers and other local exchange carriers. Unlike that section, Section 251 of the Act does differ between incumbent local exchange carriers (ILECs) and other LECs. Section 251(b) imposes certain obligations on all LECs. Section 251(c) imposes additional obligations on ILECs. Section 251(h) contains a statutory definition of ILEC.

The Commission previously has determined that LECs who are not ILECs (*e.g.*, competitive access providers) are non-dominant carriers and, as such, are subject to the Commission's streamlined tariff rules and policies. Those rules permit non-dominant carrier tariff filings to become effective on one day's notice.[5] Literal application of Section 203(a) to

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[4]47 U.S.C. § 153(26).

[5]47 C.F.R. §61.23(c). See also Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd 6752 (1993), *vacated in part*, Southwestern Bell Corp. v. FCC, 43 F.2d

all LECs, including non-dominant LECs who are not ILECs as defined by Section 251(h) would have the peculiar result of increasing the notice period for those non-dominant carrier tariff filings from one day to 7 or 15 days. Nothing in the 1996 Act or in its legislative history reflects Congressional intent to increase the Commission's regulation of non-dominant carrier tariffs or to extend the notice periods for those carriers' tariffs. Neither does the language of Section 402(b)(1)(A)(iii) of the 1996 Act nor its legislative history indicate that Section 204(a)(3) is intended to limit the authority of the Commission under Section 10 of the Act[6] to forbear from applying any regulation or provision of the Act to telecommunications carriers or services or classes of carriers or services if such provision or regulation is not necessary to assure just and reasonable rates or to protect consumers, and if such forbearance is in the public interest. In fact, on May 2, 1996, TW Comm submitted a petition pursuant to Section 10(c) of the Act asking the Commission to forbear from requiring non-dominant competitive access providers to file tariffs. That petition remains pending. Accordingly, the Commission should utilize this proceeding to construe Section 204(a)(3) as being applicable only to the tariff filings of ILECs.

II. The Commission's First Suggested Interpretation of the Meaning of "Deemed Lawful" Should be Rejected Since that Interpretation would Derogate the Common Law Right to Damages for Unlawful Charges. The Second Suggested Interpretation Would Streamline the Tariff Filing Process Without Changing the Substantive Law Applicable to Tariffs.

As indicated above, Section 204(a)(3) states, in part, that LEC charges, practices, regulations, or classifications shall be "deemed lawful." The Notice solicits comment on two

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1515 (D.C. Cir. 1995).

[6]47 U.S.C. § 160.

alternative interpretations of the words "deemed lawful" as used in Section 204(a)(3). Under the Commission's first suggested interpretation, LEC tariffs not suspended prior to their effective date would be considered to be lawful charges, practices, regulations or classifications unless or until those charges, practices, regulations, or classifications were determined by the Commission to be unlawful following a rate investigation or formal complaint proceeding. The effect of this interpretation would be to insulate LECs from potential liability for damages occasioned by those charges, practices, regulations, or classifications between the time that they became effective and an eventual determination that they were unlawful.[7] The Commission's second suggested interpretation would establish a presumption of lawfulness governing LEC tariff filings and would create higher burdens to warrant suspension and investigation. However, unlike the first suggested interpretation, the presumption of lawfulness would not preclude award of damages to aggrieved persons for rates charged during the period that the tariff was in effect.[8]

TW Comm believes that the Commission's second interpretation of "deemed lawful" is the more appropriate approach. The first interpretation would embody a very significant substantive change in the law of tariffs. Specifically, it would eliminate the right of persons harmed by a carrier's unlawful charges to be awarded damages for the harm incurred during the time that a charge, practice, regulation, or classification found to be unlawful remained in effect prior to the determination of the tariff's unlawfulness. In contrast, the second approach would not change the substantive law of tariffs, but would modify -- and streamline -- the procedures

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[7]Notice, *supra* at ¶¶ 8-11.

[8]*Id.* at ¶ 12.

for review of LEC tariffs. That the change reflected by the "deemed lawful" language of Section 204(a)(3) should be considered procedural rather than substantive is supported by the legislative history of that section. The Conference Report states with respect to that provision as follows: ". . . new subsection (b) of 402 of the conference agreement reflects regulatory relief that streamlines the procedures for revision by local exchange carriers of charges, classifications and practices under section 204 of the Communications Act."[9] Thus, it seems clear that the addition to the Act of Section 204(a)(3) by the 1996 Act was intended to be a procedural change in the Commission's treatment of LEC tariff filings by making their pre-effectiveness review more comparable with the streamlined pre-effectiveness review procedures applicable to other carriers' tariffs. It was not intended to substantively change the lawfulness of those tariffs or to change the law with respect to entitlement to damages.

There is another reason why the procedural interpretation of Section 204(a)(3) rather than the substantive interpretation should be embraced by the Commission. The Commission's first suggested interpretation, if adopted, would deprive persons injured by LECs' unlawful charges, practices, regulations, or classifications from their entitlement to damages for injury caused thereby. The right to be awarded damages for harm caused by the unlawful charges, practices, regulations or classifications of a common carrier is a common law right. It has long been held that statutes in derogation of such rights are to be strictly construed.[10] Moreover, it is a longstanding principle of statutory construction that statutes which invade the common law are

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[9]S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 69 (1996) (emphasis added) ("Conference Report").

[10]Del Bosco v. U.S. Ski Association, 839 F. Supp. 1470 (D. Colo. 1993).

to be read with a presumption favoring the retention of long-established and familiar principles, except where a statutory purpose to the contrary is evident.[11] Accordingly, the Commission should avoid an interpretation of Section 204(a)(3) which would deprive persons injured by the unlawful actions of common carriers from being able to be compensated for those injuries caused by those unlawful charges, practices, regulations, or classifications. Such a result can be avoided if the Commission adopts its second suggested interpretation of that subsection -- an interpretation which is consistent with the clear legislative intent to streamline the procedures for review of -- but not to substantively change -- the law applicable to LEC tariff filings.

III. Section 204(a)(3) is Applicable Only to Rate Increases and Rate Decreases

The Notice asks whether the streamlined procedures for LEC tariffs are applicable to all LEC tariff filings, or only to those which involve rate increases or decreases for existing LEC services. TW Comm concurs with the Commission that the statutory language is susceptible to more than one possible interpretation. However, it believes that the better view, and the view more consistent with the overall objectives of the 1996 Act, is to limit the scope of Section 204(a)(3) to rate decreases and rate increases.

In construing the scope of Section 204(a)(3), the Commission should remain mindful of the overall purpose of the 1996 Act: to establish a "pro-competitive, deregulatory national policy framework for the telecommunications industry."[12] The Commission should bear in mind its role in achieving that objective. The Commission's role is, in significant part, that of a

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[11] U.S. v. Texas, 507 U.S. 529, 534 (1993), quoting from Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952).

[12] Conference Report, *supra* at 1.

transition manager. During the transition of the telecommunications industry, primarily the local exchange portion of the industry, from a regulated monopoly environment to a competitive environment, ILECs will continue to possess attributes of market dominance. Moreover, potential competitors will be reliant upon ILEC services and access to ILEC networks and facilities in order to develop competing services. This reliance on ILEC network capacity and services is demonstrated by the interconnection, unbundling, collocation, and resale at wholesale rate requirements codified at Section 251(c) of the Act.

As the Commission is well-aware, the manner in which these facilities and services will be available to competitors will be set forth in the tariffs of the ILECs. With respect to interstate access, including, *e.g.*, collocation, the terms and conditions of the ILEC tariffs, including non-price provisions, will be critical. To construe Section 204(a)(3) in a manner which would enable ILECs to file tariff transmittals setting forth those terms and conditions with minimal pre-effective date scrutiny would enable ILECs to provide those services so as to be of little use to competitors. Examples of non-price tariff provisions which would undermine development of interstate access competition include provisioning intervals, quality of service standards, and conditions of access to collocated facilities. In order to ensure that the Commission retains the authority and the practical ability to prevent ILECs from implementing their interstate access services, including collocation, in a manner which undermines competition, the Commission should apply the streamlined tariff procedures of Section 204(a)(3) only to ILEC tariff filings which are limited to rate increases and decreases for existing services.

IV. Electronic Filing of LEC Tariffs Could Enhance the Ability of the Public to Analyze and Prepare Timely Petitions in Response to Those Tariff Filings

TW Comm supports the Commission's proposal at ¶¶ 21-22 of the Notice to implement a system of electronic tariff filings. Timely access to tariffs filed with the Commission long has been a problem, especially for those persons and companies located outside Washington who are unable to send representatives to the Commission's offices on a daily basis to check for tariff filings. The ability to access ILEC tariff filings electronically will become even more important if the Commission adopts reduced tariff petition filing periods as proposed at ¶ 28 of the Notice.[13]

TW Comm is concerned, however, that electronic tariff filings could be subject to security risks. Implementation of an electronic filing system would require that measures be taken so that unauthorized access to and tampering with filed tariffs would be prevented, and when such tampering occurred, could be readily detected.

On a related matter, TW Comm concurs with the Commission's proposal that ILECs be required to include summaries and legal analyses with their tariff filings.[14] While this proposal may, at first blush, appear to be unnecessarily regulatory, it must be remembered that Section

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[13]The Notice proposes a three day period following tariff filings to submit petitions to suspend and investigate, and a two day reply period to submit replies to petitions. While TW Comm understands the Commission's need to reduce the pleading periods to accommodate the 7/15 day notice periods mandated by Section 204(a)(3), it objects to the inclusion of weekend days and holidays in the calculation of days. Under that proposal, petitions against tariffs filed on a Friday would be due the following Tuesday; replies to petitions to suspend and investigate filed on a Friday would be due the following Monday. Such truncated filing periods would preclude any meaningful review of tariffs by persons affected by the tariff filings.

[14]Notice at ¶ 25.

204(a)(3) contemplates the effectiveness of ILEC tariff filings on very short notice which will have significant impacts on customers and competitors, and which will, in some instances, be of questionable lawfulness. The timely availability of concise and clear summaries and legal analyses will be an invaluable tool to the Commission and to the public in their efforts to analyze and articulate the bases for objections to filed tariffs within the brief notice periods set forth at Section 204(a)(3).

V. ILEC Requests for Confidential Treatment of Tariff Cost Data Should be Disfavored and Should Rarely be Granted

ILEC requests for confidential treatment of cost data accompanying tariff filings should be rarely, if ever, granted by the Commission. Where an ILEC attempts to justify rates for tariffed services based on costs of service, the data upon which it relies must be available for public scrutiny. Notwithstanding the streamlined tariff procedures and reduced notice periods set forth at Section 204(a)(3), the Act's statutory standards for tariff lawfulness remain applicable. Charges, practices, classifications, and regulations must be just and reasonable.[15] They may not be unreasonably discriminatory.[16] Where an ILEC purports to justify the lawfulness of its tariffs under those statutory standards based on cost data, the data upon which the ILEC relies must be available to the Commission and to the public.

In those rare circumstances where it is demonstrated by an ILEC that confidential treatment of such data is necessary to prevent competitive damage to an ILEC, the data should be made available to interested persons under narrowly-drawn protective orders limited only to

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[15]47 U.S.C. § 201(b).

[16]47 U.S.C. § 202(a).

protecting the legitimate competitive interests of the ILEC. Such orders may preclude use of the data for competitive or marketing purposes and may preclude access to the data by marketing personnel of parties to such orders. However, there should be no limitations on use of the data by interested parties as necessary to evaluate the lawfulness of the tariff filing and to participate in preparation of petitions or other comments on the tariff or to participate meaningfully in tariff investigatory proceedings. Neither should participating parties' legal, regulatory, and analytical personnel be precluded from access to the data.

CONCLUSION

For the reasons discussed in these comments, TW Comm urges the Commission to adopt rules and policies governing ILEC tariffs under Section 204(a)(3) of the Act that are consistent with the positions articulated in these comments.

Respectfully submitted,

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October 9, 1996

CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, hereby certify that on this 9th day of October, 1996 copies of the foregoing *Comments of Time Warner Communications Holdings, Inc.* in *Docket No. 96-187* were served, via hand delivery, to the following:

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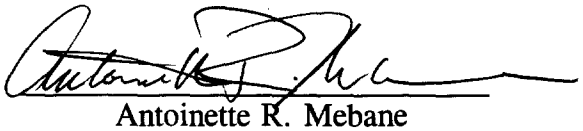

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Dated: October 9, 1996

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